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No. 92-191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERCONTINENTAL LIFE INSURANCE COMPANY,
Petitioner,

v.

LOU R. LINDBLOM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an award of punitive damages comports with the due process clause when the award is justified by the particular circumstances and the award has been adequately reviewed by lower courts pursuant to this court's remand order.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner InterContinental Life Insurance Company's statement of the case omits crucial facts and interjects the company's erroneous contentions that (a), in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), this Court held that the Due Process Clause required a set mathematical ratio between punitive and compensatory damages and (b) "the lower courts are in disarray on the standards governing [punitive damage] awards."

An objective review of the factual record and the conduct of the Supreme Court of Alabama in its review following remand for further consideration in light of the *Haslip* opinion makes clear that the Supreme Court of Alabama did what was required of it and that the punitive damage award in this case does not violate the Due Process Clause.

Contrary to the assertions made by InterContinental in its petition, this matter presents no unresolved legal issues and no matters of importance sufficient to compel this Court's exercise of certiorari jurisdiction. InterContinental is incorrect when it suggests that the award of punitive damages reinstated by the Supreme Court of Alabama was not rationally justified under the specific facts of this case. InterContinental is further incorrect when it suggests that, to avoid constitutional problems, the Supreme Court of Alabama must establish a ratio between compensatory damages and punitive damages, which may not be exceeded.

InterContinental is not trying to address a question of great national importance which is dividing lower courts. Petitioner is asking this Court, as it previously asked the trial judge and the state supreme court, to reverse the factual findings of the jury. InterContinental's fundamental argument has always been that any award of punitive damages was unjustified. This petition should be denied.

A. Factual Background.

Respondent, Lou R. Lindblom, adopts the statement of the case and statement of the facts set forth in the two opinions issued in this case by the Supreme Court of Alabama. Petition for Writ of Certiorari, App. at 3a-7a & 14a-30a (hereinafter cited as "Petition"). In addition, Ms. Lindblom states the following facts.

On December 1, 1980, InterContinental issued a $10,000 life insurance policy to Tommie L. Roddenberry, designating Ms. Roddenberry's daughter, Lou R. Lindblom, as beneficiary. *Id.* at 15a. Initially, the premiums were paid quarterly. *Id.* On January 1, 1984, Ms. Lindblom, who had assumed responsibility for handling her mother's business affairs, wrote InterContinental a letter stating that she wished to change from quarterly to monthly premium payments. *Id.* at 16a. Enclosed with this letter was a check for a single month's premium, which Ms.

Lindblom indicated was the December 1983 payment. In this letter, Ms. Lindblom further asked that InterContinental send her a bill for the January 1984 premium. *Id.* InterContinental never replied to this letter and never sent a bill for the January 1984 payment. Tr. 101. On February 2, 1984, Ms. Lindblom mailed another payment to InterContinental, which Ms. Lindblom testified was intended to cover the payment due on February 1. Tr. 101 & 155.

InterContinental made a unilateral decision to "back-apply" the February 2d check to cover the January premium for which InterContinental had never sent a notice. Petition, App. at 16a. It was at that point in time—January, 1984—some twenty months prior to Ms. Roddenberry's death, that the problem, which led to InterContinental's eventual denial of Ms. Lindblom's claim, began. Simply stated, because she was never billed, Ms. Lindblom did not remit the January 1984 premium payment. Tr. 87-88.

For the next twenty months, Lou Lindblom mailed a check to InterContinental early each month, except for the September 1985 check which was dated September 15, 1985. Tr. 86, 88-89 & 102-09. No fewer than three of InterContinental's employees admitted at trial that every one of these twenty payments was accepted by InterContinental outside of the written 31-day grace period contained in the policy, because InterContinental had decided to continuously back apply these payments to cover the missed January 1984 payment. Tr. 207, 528 & 606; Petition, App. at 16a. Donna Faulkner, one of two InterContinental employees involved in the claim denial, admitted that Ms. Roddenberry's policy technically lapsed each and every month beginning in December 1983. Tr. 427 & 608.[1]

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[1] Ms. Faulkner agreed that, between January 1984 and October 1985, InterContinental could accept the premium payments and retain the right to deny payment of benefits in the event of Tommie Rodenberry's death. Tr. 608.

In January 1985, Ms. Lindblom received two notices concerning an increase in the monthly premium due on the subject policy. The notices contained different figures as to the amount of new premium due. Ms. Lindblom immediately wrote InterContinental to determine which figure was correct. In a responding letter, InterContinental informed her of the correct figure but made no mention of InterContinental's "position" that her monthly payments were being made outside the policy's stated grace period and that the policy would lapse if any future payment was not made before the fourteenth of the month. Petition, App. at 16a-17a; Tr. 119, 299-300, 609-10 & 614-19. Failure to provide such "pre-lapse" notification was a violation of InterContinental's own stated procedures. Tr. 527-28.

InterContinental continued its practice of back applying Ms. Lindblom's payments through August 1985. Petition, App. at 17a. When InterContinental received a check dated September 15, 1985, it treated this check as the payment of the August 1985 premium. *Id.* In early October 1985, Ms. Lindblom, who was still unaware of any problem, sent the next payment to InterContinental. *Id.* On October 11, 1985, InterContinental wrote Ms. Lindblom and informed her that the policy had lapsed. *Id.* Believing that she was current on the policy and not understanding how the policy could have lapsed, Ms. Lindblom contacted Mr. Culver at the Culver Agency about the problem.[2] Mr. Culver told Ms. Lindblom that he would take care of the problem and instructed Ms. Lindblom to send him a copy of the canceled October 1985 premium check when she received it from her bank. *Id.* Later, when Mr. Culver received this canceled check and spoke to Ms. Lindblom, he informed her that the policy was still in force. *Id.*

On October 23, 1985, Tommie Roddenberry died. Ms. Lindblom filed a claim with InterContinental for the

[2] Culver was the InterContinental agent from whom Ms. Roddenberry had purchased the subject policy. Tr. 387-88 & 390.

death benefits under the subject policy. Petition, App. at 17a. InterContinental informed Ms. Lindblom that benefits would not be paid because the policy had lapsed prior to her mother's death, due to non-payment of premiums. *Id.* at 18a. At this point, InterContinental did not refund any premiums paid after the alleged lapse. *Id.* In fact, InterContinental had continued to cash Ms. Lindblom's premium payment checks after August 1, 1985. Tr. 125 & 142. The Culver Agency contacted InterContinental on several occasions and sent InterContinental copies of the canceled checks for Ms. Lindblom's August, September, and October payments. *Id.* InterContinental nevertheless continued to refuse to pay the benefits. *Id.* InterContinental eventually refunded the amount of the two payments ($71.64) received after the alleged lapse. *Id.* This refund was forwarded more than ninety days after InterContinental sent its "lapse notice" (October 11, 1985) and more than five months after InterContinental claimed the policy had lapsed (August 1, 1985). Tr. 125 & 142.

InterContinental denied the claim based upon its position that its computer record's showed that the policy had lapsed before Tommie Roddenberry's death. Ms. Lindblom asked InterContinental to review its decision. Specifically, Ms. Lindblom asked how the policy could have lapsed if she had made monthly payments for approximately twenty months and had never received any notice that all those payments "were made outside the [written] grace period."

InterContinental never reviewed its "written" records to determine why Ms. Lindblom's twenty payments were "deemed" outside the grace period. InterContinental never examined its files to find Ms. Lindblom's letter of January 1, 1984, in which she asked to be billed for the January 1984 payment. If InterContinental had looked at the documents, InterContinental would have discovered that it had previously accepted premium payments out-

side both the written grace period and the unwritten courtesy period. Tr. 207, 410, 520 & 606.

B. The Proceedings Below.

The jury was charged that it could award compensatory damages for both out-of-pocket economic loss and mental anguish. Tr. 831. The jury was also instructed that it could award punitive damages. The jury returned a verdict for Lou Lindblom in the amount of $3,012,400. Because this was a general verdict, the extent to which the award represented compensation for mental anguish and the extent to which it represented punitive damages cannot be determined with certainty.

The trial judge conducted an extensive review of this award. To determine whether the award was appropriate and not excessive, the judge applied the standards and followed the procedure mandated by the Supreme Court of Alabama in *Hammon v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). Following a hearing and consideration of the totality of the evidence presented by the parties, the judge entered an order upholding the award. In this order, the judge detailed the reasons for his decision. Petition, App. at 19a & 28a.

InterContinental perfected an appeal to the Supreme Court of Alabama. The state supreme court found that the trial judge had conducted a "careful" *Hammond* review and that the jury's award was appropriate under the *Hammond/Hornsby* standards. *Id.* at 29a. Exercising its right to review awards for excessiveness, the state supreme court conducted a review which included applying the *Hammond/Hornsby* standards and a "comparability review" in order to ensure that the award was not disproportionate with awards in similar cases. After "a thorough examination of the record . . . and a comparison of verdicts in similar cases . . .," the Supreme Court of

Alabama decided to reduce the jury award from $3,012,400 to $1,000,000. *Id.* at 29a-30a.

InterContinental petitioned this Court for certiorari. This petition was granted, the judgment was vacated, and the case was remanded for further consideration in light of *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ——, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991). *Id.* at 13a.

On remand, Lou Lindblom and InterContinental submitted to the Supreme Court of Alabama briefs presenting their respective positions as to the application of the *Haslip* ruling to the specific facts generated in this case. *Id.* at 2a. Having only recently rejected the "proportionality" argument raised by Intercontinental, the Supreme Court of Alabama refused to readdress this challenge to the amount of the award. *Id.* at 2a-3a (citing *Southern Life & Health Insurance Company v. Turner*, 586 So. 2d 854 (Ala. 1991)).

The state supreme court then reexamined the record in order to properly address InterContinental's "reprehensibility" argument in light of this Court's mandates. *Id.* at 3a-7a. The state supreme court next applied the *Hornsby* factors, which this Court cited with approval in the *Haslip* opinion, to the particular facts in this matter. *Id.* at 8a-9a. That court expressly held: "Under our reading of *Haslip*, this Court's previous judgment against InterContinental in the amount of $1,000,000 bears a rational relationship to the legitimate goals of punishment and deterrence. Consequently, that judgment is hereby reinstated." *Id.* at 9a-10a.

InterContinental's application for a stay pending disposition of a petition for writ of certiorai has been denied by this Court.

REASONS FOR DENYING THE PETITION

THE SUPREME COURT OF ALABAMA CONDUCTED THE REVIEW MANDATED BY THIS COURT IN *PACIFIC MUTUAL LIFE INSURANCE COMPANY v. HASLIP*, 499 U.S. ——, 111 S. CT. 1032, 113 L.Ed.2d 1 (1991); UNDER THE SPECIFIC FACTS, THE AWARD OF PUNITIVE DAMAGES AFFIRMED BY THE SUPREME COURT OF ALABAMA WAS NEITHER EXCESSIVE NOR DISPROPORTIONATE IN VIOLATION OF THE DUE PROCESS CLAUSE; AND THERE IS NO CONFUSION AMONG THE LOWER COURTS AS TO THE MEANING OF THE HOLDING IN THE *HASLIP* OPINION.

A. Summary of Argument.

In its petition for a writ of certiorari, InterContinental denominated four "reasons" as to why it was entitled to such relief. A reading of InterContinental's argument reveals that InterContinental contends: (1), on remand, the Supreme Court of Alabama failed to conduct the review mandated by this Court; (2) InterContinental's actions did not merit a million dollar judgment; and (3) "[i]t . . . is plain that the lower courts will not reach a consensus on how to apply *Haslip*'s principles and that further guidance from this Court is essential." Interspersed throughout the petition, InterContinental calls for (a) the judicial imposition of a rigid ratio or relationship between compensatory damages and punitive damages and (b) a ban on the awarding of meaningful punitive damages.

In opposing InterContinental's petition, Lou Lindblom presents the following arguments:

1. The Supreme Court of Alabama conducted the review mandated by this Court in its remand order. Nothing in the *Haslip* opinion, or in this Court's subsequent rulings, required the state supreme court to adopt a "proportionality" rule. The state supreme

court reexamined the record to insure that InterContinental's due process rights were fully protected.

2. Under the specific facts, the award affirmed by the Supreme Court of Alabama was not excessive. InterContinental's contention that its conduct was not reprehensible is predicated on an acceptance of InterContinental's version of the facts. In effect, InterContinental asks this Court to overturn the factual findings of the jury and to reject the trial judge's and the state supreme court's analysis of the evidence presented at trial. In response to InterContinental's contention that it may have been guilty of a "slight administrative oversight," the Supreme Court of Alabama replied that the evidence reasonably supported a quite different assessment of InterContinental's activities.

3. There is no confusion among the lower courts as to the meaning of the holding in the *Haslip* opinion. Several lower courts have applied the *Haslip* holding and analysis. A review of those opinions reveals a general consensus as to the meaning of this Court's holding and observations. Subsequent actions of this Court indicate that the lower courts have correctly applied the holding in the *Haslip* opinion. InterContinental perceives "confusion" because lower courts have been unwilling to impose drastic, "bright line" restrictions on the amount of punitive damages which may be assessed. InterContinental makes a public policy argument and not a constitutional argument.

B. The Supreme Court of Alabama Conducted the Review Mandated by This Court in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ——, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991).

In its petition InterContinental contends that the Supreme Court of Alabama has "depart[ed] from what appears to be the central holdings of *Haslip* in two respects: they expressly disavow both the requirement of a relationship between the compensatory and punitive

awards, and the need for *independent* judicial review (post-trial and on appeal) of punitive awards." Petition for Writ of Certiorari at 11-12 (emphasis in original).

Lou Lindblom will now address the contention that the Supreme Court of Alabama disavowed a "requirement of a relationship between compensatory and punitive damages." In the next subsection, Ms. Lindblom will address the question of an independent judicial review.

On remand, the Supreme Court of Alabama rejected InterContinental's "proportionality" argument based upon its opinion in *Southern Life & Health Insurance Company v. Turner*, 586 So. 2d 854 (Ala. 1991) (the other Alabama case which was vacated and remanded for reconsideration by this Court following the rendering of the *Haslip* opinion). Petition, App. at 2a-3a. In the *Turner* opinion, the state supreme court held:

> The only means to ensure that punitive damages awards fall within the bounds of due process imposed by the Alabama and United States Constitution is to evaluate the facts and merits of each case according to the factors set out in *Green Oil Co.* and *Central Alabama Elec. Co-op.* A constitutionally permissible punitive damages award against a wealthy defendant, who engages in egregious conduct that fortuitously does little real harm but has the potential to do great harm, might involve a greater ratio of punitive damages than that in this case. . . . We find no compelling reason to set an arbitrary mathematical relationship between compensatory and punitive damages. Imposing such a relationship would inevitably result in injustice, and we decline to impose it.

586 So. 2d at 858. On further review in light of the *Haslip* opinion, the Supreme Court of Alabama reaffirmed its original decision regarding the excessiveness of the challenged award. Southern Life sought no further appellate review.

After the delivery of the *Haslip* opinion but before rendering its second opinion in the present matter, in *Principal Financial Group v. Thomas*, 585 So. 2d 816 (Ala. 1991) the Supreme Court of Alabama addressed the "proportionality" argument now being raised by Inter-Continental. The state court used an analysis identical to that employed in *Turner* to reject the defendant's claim that an award of punitive damages, which was 750 times the amount of compensatory damages assessed, was excessive per se. This rejection of the "proportionality" argument was presented to this Court in a petition for a writ of certiorari. This Court denied the petition. —— U.S. ——, 112 S. Ct. 649, 116 L.Ed.2d 666 (1991). Thus, this Court has already denied a certiorari petition in an Alabama case involving insurance fraud and bad faith and raising the proportionality/excessiveness issue.

Lou Lindblom would also remind this Court of its denials of requests to review the results in *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 409 S.E.2d 501 (1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 1175, 117 L.Ed.2d 420 (1992), and *Glasscock v. Armstrong Cork Company*, 946 F.2d 1085, *rehrg. denied*, 951 F.2d 347 (5th Cir. 1991), *cert. denied, sub nom. Celotex Corporation v. Glasscock*, —— U.S. ——, 112 S. Ct. 1178, 118 L.Ed.2d 435 (1992).

As in the present matter, the initial judgment of the Supreme Court of Georgia in *Hospital Authority of Gwinnett County v. Jones* was vacated by this Court, and the state supreme court was instructed to further consider the judgment in light of the *Haslip* opinion. In that case, the plaintiff had been awarded approximately $5,000 in nominal damages and $1.3 million in punitive damages. On remand, the Georgia court "rejected the notion that punitive damages must necessarily bear some relationship to the *actual* damages awarded by the jury" but "note[d] that this relationship [between the two] may be considered on the issue [of] whether the punitive damage award is excessive . . . ." 409 S.E.2d at 503 and n.3

(emphasis in original). That state court observed that, in the *Haslip* opinion, this Court approved the Alabama practice of considering whether there was a reasonable relationship between the awarded punitive damages and certain factors, other than the amount of compensatory damages awarded. *Id.*

The Hospital Authority filed a petition for writ of certiorari following the reinstatement of the $1.3 million punitive damages award. In that petition, the Hospital Authority presented the following question: "In reaffirming [the] award of punitive damages in [the] sum of $1.3 million, did [the] Georgia Supreme Court comply with [the] mandate of this court to reconsider its affirmance of that award in light of [*Haslip*] or did that court's decision conflict with *Haslip?*" 60 U.S.L.W. 3548-49 (Feb. 11, 1992). By denying the Hospital Authority's petition, this Court apparently replied that the Supreme Court of Georgia complied with this Court's instructions and that the reaffirmance did not conflict with the *Haslip* opinion.

In its *Glasscock* opinion, the United States Court of Appeals for the Fifth Circuit reviewed the effect of the *Haslip* opinion in a case where the ratio between the compensatory damages and punitive damages was 20:1. The Fifth Circuit observed that: "The *Haslip* Court declined to draw a bright line between impermissible and permissible procedures for assessing exemplary damages." 946 F.2d at 1097. Instead, after *Haslip*, the "inquiry is whether, *under the circumstances of* [*the particular*] *case*, the procedure for assessing and reviewing punitive damages satisfy due process." 946 F.2d at 1099 (emphasis in original).

When a defendant manufacturer in *Glasscock* sought a writ of certiorari, only two Justices voted to grant the writ. At —— U.S. ——, 112 S. Ct. 1778, 118 L.Ed.2d 435. As in *Hospital Authority of Gwinnett County v. Jones* and *Principal Financial Group v. Thomas*, this

Court declined an offer to hold that any award of punitive damages in excess of four to five times the amount of compensatory damages awarded is per se constitutionally prohibited.

The judicial rejection of a stringent "proportionality" rule is almost universal. On remand from this Court, the Supreme Court of West Virginia refused to reinstate the initial award of punitive damages in *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991). In doing so, that state supreme court was not willing to declare that the *Haslip* opinion created "clear, bright-line rules." 413 S.Ed2d at 907. Instead, the West Virginia court simply held that West Virginia courts had not previously conducted a review which was either "meaningful [or] adequate under the standards established in *Haslip*." 413 S.E.2d at 907-08.

The Supreme Court of West Virginia stated that, "generally, . . . punitive damages must bear a reasonable relationship to actual damages because compensatory damages provide a reasonable measure of likely harm." At the same time, "where the actual harm was minimal but the potential harm was tremendous, a jury may reasonably find punitive damages commensurate with the potential harm." 413 S.E.2d at 908. That court wanted to avoid a rigid cap.

The Supreme Court of West Virginia has amplified its thoughts concerning punitive damages and the *Haslip* opinion in *TXO Production Corporation v. Alliance Resources Corporation*, 1992 WL 102319 (W. Va. May 14, 1992. In that "slander of title" case, Alliance Resources had been awarded $19,000 in compensatory damages and $10 million in punitive damages. In its appeal, TKO argued that the punitive damage award violated its due process rights as enunciated in *Haslip* and *Garnes*. The state supreme court held: "We find no reversible error in the lower court's conduct of the trial and, because appellant and its agents and servants failed to conduct

themselves as gentlemen, we decline to enter a remittitur." 1992 WL 102319 at *3.

The West Virginia court expressly held:

> Accordingly, we find that in cases where the defendant has intentionally committed mean-spirited and harmful acts (especially when the provable compensatory damages are small, but the potential of harm is great), even punitive damages 500 times greater than compensatory damages are not per se unconstitutional under *Haslip* and *Garnes*. The appropriateness of such awards depends on what it reasonably takes to attract the defendant's attention because, as we said in *Garnes*, an award that might be unreasonable if awarded against Jeff's Neighborhood Hot Dog Stand could be quite reasonable if awarded for the same conduct against McDonald's.

1992 WL 102319 at *20. The Supreme Court of West Virginia appears to endorse the approach taken by the Supreme Court of Alabama for several years, the approach taken by the Supreme Court of Alabama in the present matter.

In its petition, InterContinental writes:

> Judges of other courts have suggested that this "Court's opinion in [*Haslip*] did not make clear which elements of awarding punitive damages are constitutionally necessary," noting the "whimsy, irrationality, and utter unpredictability infecting punitive damages awards in this state." *Hilgedick v. Kochring Fin. Corp.*, 8 Cal. Rptr. 2d 76, 94 (Cal. Ct. App. 1992) (concurring opinion).

Petition at 11.

Associate Justice Peterson's thoughts in the *Hilgedick* opinion are quoted out of context and, certainly, misapplied by InterContinental. When he used the terms "whimsy," "irrationality," and "utter unpredictability," the justice was referring to the wide range of punitive damage assessments which had been previously rendered

in that particular litigation. After making this personal observation, Justice Peterson stated: "This situation, unless reformed, will obviousy continue to exist in California under our punitive damages scheme, which apparently remains constitutionally intact after *Haslip*." *Hilgedick v. Kochring Finance Corporation*, 5 Cal. App. 4th 1118, 8 Cal. Rptr. 2d 76, 94 (1992).

Justice Peterson next opined: "[The members of the *Haslip* court] all recognized the power of state courts, as well as state legislatures, *quite independently of federal due process* concerns, 'to restrict or abolish the common-law practice of punitive damages . . . .'" 8 Cal. Rptr.2d at 94-95 (citing Justice Scalia's concurring opinion in *Haslip*; emphasis added). Justice Peterson was not saying that due process considerations mandated the imposition of rigid ratios or caps on punitive damage awards. Instead, Justice Peterson was arguing that, as a matter of good public policy, the common-law rules should be "reformed."

InterContinental also misreads the tenor of the thoughts of the Maryland appellate court as expressed in *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, 88 Md. App. 672, 596 A.2d 687 (1991), *cert. denied*, —— Md. ——, 605 A.2d 137 (1992). The state intermediate appellate court merely held that the specific facts did not support the amount of punitive damages awarded by the jury. The Maryland court noted that it "carefully eschew[ed] any desire, or need, to engage in a proportionality review of punitive damage awards." 596 A.2d at 711. That court observed that, under appropriate circumstances, the amount of the punitive damage award may permissibly far exceed the amount of compensatory damages awarded. As examples, that court cited *Exxon Corporation v. Yarema*, 69 Md. App. 124, 516 A.2d 990, *cert. denied*, 309 Md. 48, 522 A.2d 392 (1986) ($160,000 in compensatory damages and $910,000 in punitive damages), and *Potomac Electric v. Smith*, 79 Md. App. 591, 558 A.2d 768, *cert. denied*, 317 Md.

393, 564 A.2d 407 (1989) ($2,000 in compensatory damages and $7.5 million in punitive damages).[3]

InterContinental correctly points out that, in *Hutchinson v. Stuckey*, 952 F.2d 1418, 1422 (D.C. Cir. 1992), the court held that "a jury should be permitted to consider the amount of actual damages in calculating a punitive damage award." However, that opinion does not state that the amount of actual damages assessed establishes a cap on the amount of punitive damages which may be constitutionally awarded. In fact, that court concluded that the *Haslip* opinion only requires that punitive damages "*have some understandable relationship to compensatory damages.*" 952 F.2d at 1422 (emphasis in original).

The opinion rendered in *Mattison v. Dallas Carrier Corporation*, 947 F.2d 95 (4th Cir. 1991), is quite revealing. At the time of the trial, South Carolina state courts had not adopted a procedure which would meet the standards announced in *Haslip*. The Fourth Circuit noted that, subsequently, the Supreme Court of South Carolina had established such a procedure. See *Gamble v. Stevenson*, —— S.C. ——, 406 S.E.2d 350 (1991). Interestingly, the federal court observed that the South Carolina court added the following item to the *Haslip*-approved factors: "no punitive damages award be 'grossly disproportionate' to the severity of the conduct." 947 F.2d at 106. Thus, in South Carolina, "proportionality" concerns the relationship between the punitive damage award and the severity of the defendant's wrongful conduct and not the relationship between the punitive damage award and the monetary harm caused by the defendant.

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[3] InterContinental also cited *Market Tavern, Inc. v. Bowen*, 1992 WL 93521 (Md. App. May 11, 1992), as a lower court opinion adhering to *Haslip*'s due process limits. Petition for Writ of Certiorari at 16 n.11. The language in that opinion does not endorse the judicial imposition of a "proportionality" rule. At best, the opinion endorses the procedure utilized by the Supreme Court of Alabama.

More significantly, the Fourth Circuit's major concern was with how a federal court, bound by the provisions of the Federal Rules of Civil Procedure, could effectively conduct the review mandated in *Haslip*. That court felt that it lacked the authority which was possessed by state appellate courts when it came to "correcting" excessive awards of punitive damages.

This Court in *Haslip* did not require states to adopt a "proportionality" rule or restrictions on the amount of punitive damages based upon the amount of compensatory damages awarded. This Court indicated that the ratio between punitive and compensatory damages should be considered in deciding whether a particular judgment was excessive and that if the ratio was greater than 4:1 or 5:1 greater scrutiny was required. Since rendering the *Haslip* opinion, this Court has refused to review punitive damage awards which far exceed the 4:1 or 5:1 ratio. State courts have affirmed awards which exceed these ratios *only after* explaining why the specific circumstances justified such high awards. The system envisioned in the *Haslip* opinion has been properly functioning and has been protecting defendants' due process rights, including the due process rights of InterContinental in the present matter.

C. Under the Specific Facts, the Award Affirmed by the Supreme Court of Alabama Was Not Excessive.

On remand, the Supreme Court of Alabama conducted the very same thorough review which this Court approved in the *Haslip* opinion. In reinstating its initial determination that an award of $1 million was not excessive, the state supreme court conducted the review envisioned by *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Company v. Hornsby*, 539 So. 2d 218 (Ala. 1989).

After stating the seven factors from *Green Oil*, the Supreme Court of Alabama wrote:

First, the unusually subtle nature of the practice employed by InterContinental rendered detection particularly difficult. Moreover, the trial court . . . noted the "evasive and inconsistent testimony" presented by InterContinental's employees, including its senior vice president; that testimony indicated an ongoing attempt at "concealment" of facts relating to its wrongful conduct.

Second, regarding the "existence and frequency of similar past conduct," Mr. Grace testified as follows:

> Q. Now, you have also told me before, and is it still your testimony today in this court, that it is . . . InterContinental's custom and practice, given circumstances such as those existing in this case—circumstances including the continuous acceptance of premiums without any pre-waiver or pre-lapse notice—that it's your company's custom and practice to handle this type of claim exactly this way?
>
> A. Yes, it is our custom and practice to handle this claim this way.
>
> Q. *All of them?*
>
> A. That is correct.

(Emphasis added.) The evidence thus indicated widespread use of similar conduct and thus a high potential for harm similar to that suffered in this case. The frequency of this practice also increased InterContinental's potential for "profitability" from it. Finally, no criminal sanctions or civil penalties have been imposed upon InterContinental for its conduct in this instance as to require mitigation of the punitive damages award.

In view of these and other factors, we reject InterContinental's contention that the "reprehensibility of [its] conduct was [too] slight" to "support [such] a large punishment." *Appellant's Remand Brief*, at 29. Under our reading of *Haslip*, this Court's previous judgment against InterContinental in the amount of $1,000,000 bears a rational relationship to the legitimate goals of punishment and deterrence.

Petition, App. at 8a-10a.

InterContinental has continually claimed that its conduct was a "slight administrative oversight." As noted by the Supreme Court of Alabama, the evidence reasonably supported a quite different assessment of InterContinental's activities. In a nutshell, (a) InterContinental never responded to Ms. Lindblom's letter of January 1, 1984, asking for a bill for the January 1984 payment; (b), when Ms. Lindblom inquired about the two varying premium increase notices sent her in January 1985, InterContinental made no effort to remedy the "claimed" problem with late payment; (c) there was no evidence that InterContinental ever informed Ms. Roddenberry or her daughter that the monthly payments were being "received after the 31-day grace period;" (d), after Ms. Lindblom asked InterContinental to investigate its records, both after receiving the lapse notice and filing a claim for benefits, InterContinental simply reviewed its computer records and never looked at the original documentation, (e), after suit was filed and during the pre-trial phase, InterContinental steadfastly refused to even consider the possibility that Ms. Lindbolm had a valid claim; (f), at trial, InterContinental's witnesses offered conflicting testimony or endeavored to "hedge" the truth; and (g), in post-trial materials, InterContinental continues to refuse to accept the fact that an insurer may not collect monthly premium payments for approximately twenty months and then claim that a policy lapsed because of an event which occurred in January 1984.

Lou Lindbolm contends that InterContinental's overall conduct justified the award affirmed by the Supreme Court of Alabama. InterContinental's claims of being a totally "reputable insurer" were refuted. In reviewing Lou Lindblom's claim for death benefits, InterContinental refused to look beyond computer printouts and to examine the actual "paperwork." InterContinental refused to entertain the possibility that, having accepted twenty monthly payments, it had waived its right to

claim that a payment had been missed. InterContinental refused to acknowledge that during those twenty months it took no measures to inform Ms. Roddenberry or Ms. Lindblom about any problem. Ms. Lindblom wrote the company in January 1985 concerning the two conflicting notices of a premium increase. In responding, InterContinental failed to inform Ms. Lindblom of the problem. During pre-trial discovery and then again at trial, InterContinental's employees offered "evasive and inconsistent testimony" and endeavored to "conceal" facts.

D. There Is No Confusion Among the Lower Courts as to the Meaning of the Holding in the *Haslip* Opinion.

There is no confusion among the lower courts. InterContinental true objection is that state supreme courts have refused to "cap" punitive damages. InterContinental now askes this Court to legislate as opposed to interpret the Due Process Clause. InterContinental does not make a constitutional argument. Instead, InterContinental presents a public policy argument as to why punitive damages should be "capped."

In its petition, InterContinental writes:

> As this Court well knows, such enormous punitive damages awards have profound systemic consequences. Businesses compelled to divert significant portions of their earnings to pay such huge amounts (which are windfalls to a few select plaintiffs) will be forced to make up these shortfalls in other areas. Concerns over liability have led companies to withdraw products, discontinue product research, and lay off workers.
>
> Moreover, imposing excessive punitive damages unfairly harms the shareholders and employees of penalized companies, who typically have no involvement in the misconduct but must bear the brunt of the punishment.

Petition for Writ of Certiorari at 18-19 (citations omitted). This argument has nothing to do with the

InterContinental's due process rights. The "reforms" advocated by InterContinental are "quite independent[] of federal due process concerns." *Hilgedick v. Koehring Finance Corporation*, 5 Cal. App. 4th 1118, 8 Cal. Rptr. 2d 76, 94-95 (1992) (Peterson, J., concurring).

In its petition, InterContinental praises the stance taken by the Supreme Court of West Virginia following the issuance of the *Haslip* opinion. Yet, as indicated by the result in *TXO Production Corporation v. Alliance Resources Corporation*, 1992 WL 102319 (W. Va. May 14, 1992), under the appropriate circumstances, that state court would let stand a $10 million punitive damage award, an award which was over 500 times the compensatory damages assessed by the jury. Similarly, InterContinental lauds two opinions of the Court of Special Appeals of Maryland, which it contends "adhered to *Haslip*'s due process limits." InterContinental fails to mention that this same Maryland court has affirmed punitive damage awards which far exceeded the awarded compensatory damages. See *Exxon Corporation v. Yarema*, 69 Md. App. 124, 516 A.2d 990, *cert. denied*, 309 Md. 48, 522 A.2d 392 (1986) ($160,000 in compensatory damages and $910,000 in punitive damages), and *Potomac Electric v. Smith*, 79 Md. App. 591, 558 A.2d 768, *cert. denied*, 317 Md. 393, 564 A.2d 407 (1989) ($2,000 in compensatory damages and $7.5 million in punitive damages).

Thus, neither West Virginia nor Maryland were willing to take the step advocated by InterContinental. The supreme courts of both states expressed concerns about "large" punitive damage awards but held that there are situations in which "large" awards are justified.

In its petition, InterContinental lists a number of recent substantial punitive damage awards. Without reciting any facts, InterContinental simply decries the awards and infers that these are "run wild" awards. Due

to page restrictions, Lou Lindblom can only discuss a few of these cited cases.

In *General Motors Corporation v. Johnston*, 592 So. 2d 1054 (Ala. 1992), the Supreme Court of Alabama reduced a $15 million judgment in a wrongful death action to $7.5 million, a sum which the court believed was supported by the evidence.[4] The supreme court republished the trial judge's *Hammond* order, which included the following findings, among others

> "The evidence showed that General Motors was aware of this hazard prior to placing the vehicle on the market. . . . General Motors however, concealed this from the public and did not notify any of its purchasers, or prospective purchasers of the problems related to these vehicles. . . .
>
> "Simply put, General Motors made a business judgment to risk damage to property and persons from the defect in the vehicle rather than to expend the substantial sum necessary to recall and replace the defective PROMs. . . .
>
> . . .
>
> ". . . General Motors saved approximately $42,000,000 by not having a recall or otherwise notifying its purchasers of the problem related to the PROM. . . ."

592 So. 2d at 1060-61. The degree of General Motors' reprehensibility was great. General Motors was not merely remiss; it made a conscious business decision which endangered human life. The reviewing appellate court closely examined the particular facts concerning the defendant's misconduct and found the need to exact a substantial and meaningful "punishment."

In its petition, InterContinental offers a highly misleading description of the recent Alabama case, styled

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[4] Under Alabama law, the only damages recoverable in a wrongful death action are punitive damages.

Sheridan v. Northwestern Mutual Life Insurance Company, No. CV-89-2505-PR, slip op. (Ala. Circuit Ct. Apr. 10, 1992). According to InterContinental:

> The court . . . upheld the award because, it imagined, the jury might have believed that the company "made a conscious decision to keep a top-selling agent under contract with the knowledge that he was a threat to defraud its policyholders."

InterContinental chastised that trial judge for not conducting a meaningful judicial review. Petition at 24.

A copy of the trial judge's order in the *Sheridan* case is reproduced in the appendix to this submission. Lou Lindblom asks this court to read that order in order to discover the true facts concerning Northwestern Mutual's conduct. Northwestern Mutual has appealed the jury's verdict and the trial judge's denial of post-trial relief.

In *Burke v. Deere & Company*, 780 F. Supp. 1225 (S.D. Iowa 1991), in response to post-trial motions, the trial judge conducted an exhaustive review of the evidence and reduced the jury's award of $50 million in punitive damages to $28 million, or one per cent of the defendant's stipulated net worth. Plaintiff was severely injured while using a Deere combine. When Deere learned of the first injury involving use of this combine, Deere employees discovered a "flaw" in the combine's design. Instead of taking measures to actually correct the problem, Deere sent a non-specific warning decal to owners. As Deere was informed of other accidents, Deere merely modified the warning decal. There was evidence that Deere saved approximately $2.7 million by not ordering a recall to correct the defect. The trial judge ruled that: "The jury's verdict supports a finding that the jury at least in part found Deere's delay in making a retrofit package available was due in part to economic motivations." 780 F. Supp. at 1241. The trial judge agreed that, by awarding $50 million in punitive damages, the jury was announcing to Deere and similar manufacturers that

Iowans will not countenance such callous disregard of human safety. The trial judge merely thought that $28 million or one per cent of defendant's net worth was a sufficient "message."

Lower courts have not disregarded the holding in *Haslip*. To the contrary, there is every reason to believe that lower courts have engaged in the thoughtful and thorough review envisioned by this Court to prevent abuses in the awarding of punitive damages. Trial judges and appellate courts are examining the particular circumstances of a case and explaining why a large judgment was justified. See, for example, *Burke v. Deere & Company*, 780 F. Supp. 1225 (S.D. Iowa 1991), and *TKO Production Corporation v. Alliance Resources Corporation*, 1992 WL 102319 (W. Va. 1992).

In *Eichenseer v. Reserve Life Insurance Company*, 934 F.2d 1377 (5th Cir. 1991), another of the cases which this Court ordered a reconsideration in light of the *Haslip* opinion, the lower court conducted the same type of review as carried out by the Supreme Court of Alabama. That court observed that, in *Haslip*, this "Court recognized that, under certain circumstances, an award of punitive damages may 'cross the line into the area of constitutional impropriety.'" 934 F.2d at 1380 (quoting from *Haslip*). That court held that a reviewing judge or court must be cognizant of various factors, for example, the reprehensibility of the conduct in question and society's interest in discouraging insurers from committing similar acts. 934 F.2d at 1381. Finally, that court stated that "[t]he touchstone of constitutionality under *Haslip* is *not* the amount of the award in the abstract" and declared that whether a verdict meets "due process muster" must be adjudged based on the particular circumstances. 934 F.2d at 1381-82 (emphasis in original).

InterContinental merely disagrees that substantial punitive damage awards are warranted under any circumstances. In the guise of a constitutional argument, Inter-

Continental asks this Court to legislate "relief" to defendants whose conduct is deemed extremely wanton, wilful, or reckless by jurors, trial judges, and appellate courts. InterContinental wants this Court to do what it expressly refused to do in *Haslip*.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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